

# MEMORANDUM


## State of Alaska Department of Law

To: The Honorable Loren Leman  
Lieutenant Governor

Date: November 23, 2005

File No.: 663-06-0048

Tel. No.: 465-3600

From: Michael A. Barnhill   
Assistant Attorney General  
Labor and State Affairs – Juneau

Re: Review of Initiative Application  
on Video Lottery Law

### I. INTRODUCTION AND SUMMARY

You have asked us to review an application for an initiative petition entitled “An Act providing for limited gaming facilities by creating a new State of Alaska video lottery law.” We have completed our review and find that the application does not comply with the constitutional and statutory provisions governing the use of the initiative because it violates the constitutional prohibition against use of the initiative to enact special and local legislation. Under these circumstances we recommend that you do not certify the application.

This initiative petition is similar to two other initiative petitions submitted earlier this year. We reviewed each and recommended that you deny certification. *See* 2005 Inf. Op. Att’y Gen. (Aug. 1; 663-05-0239); 2005 Inf. Op. Att’y Gen. (April 19; 663-05-0177).

The sponsors have made changes to the bill in the current application. Those changes, however, are not sufficient to remedy the deficiency in the bill that we identified in our earlier reviews. The proposed bill still contains local and special legislation, which is prohibited from the initiative by the Alaska Constitution, art. XI, sec. 7.

## **II. SUMMARY OF THE PROPOSED BILL AND ANALYSIS**

### **A. Summary**

The initiative sponsors represent that this bill is “virtually identical to the second [VLT] initiative,” except in one respect. The definition of “acceptable parcel” no longer includes the restriction that it must be at least 75 miles from an “eligible facility.” Since the remainder of the bill is identical to the second VLT initiative, we incorporate our summary of that bill by reference. *See* 2005 Inf. Op. Att’y Gen. 1-4 (Aug. 1; 663-05-0239).

### **B. Analysis**

Under AS 15.45.070, the lieutenant governor is required to review an application for a proposed initiative and either “certify it or notify the initiative committee of the grounds for denial.” The grounds for denial of an application are that (1) the proposed bill is not in the required form; (2) the application is not substantially in the required form; or (3) there is an insufficient number of qualified sponsors. AS 15.45.080. We discuss these next.

#### **1. The form of the proposed bill**

The form of a proposed initiative bill is prescribed by AS 15.45.040, which requires that (1) the bill be confined to one subject; (2) the subject be expressed in the title; (3) the enacting clause state, “Be it enacted by the People of the State of Alaska”; and (4) the bill not include prohibited subjects. The prohibited subjects – dedication of revenue, appropriations, the creation of courts or the definition of their jurisdiction, rules of court, and local or special legislation – are listed in AS 15.45.010 and in art. XI, sec. 7 of the Alaska Constitution.

The bill is confined to one subject: video lotteries. The subject of the bill is expressed in the title. The enacting clause is set forth correctly. The bill does, however, include a prohibited subject. Accordingly, the bill is not in the required form.

Each of the three video lottery initiative bills have the following significant fact in common. They create a “gaming district” on a specific piece of property. The property description of this gaming district is identified as follows:

The West One-Half of the North-East One-Quarter of the Northwest One-Quarter (W1/2 of the NE 1/4 of the NW 1/4) of Section One (1), Township (12) North, Range Four (4) West, Seward Meridian, Anchorage Recording District, Third Judicial District, State of Alaska.

Sec. 2 of proposed bill (AS 05.15.701(8)). According to the records of the Department of Natural Resources this property is located near the intersection of Minnesota and Raspberry Road in south Anchorage. According to the records of the Municipality of Anchorage Finance Department, the property is owned by one Justin Green. We understand that the media has reported that one of the sponsors of this initiative, Victoria Scott, has an option to purchase this property. See Matt Volz, *Alaska Video Gaming Initiative Returns*, Anch. Daily News, July 19, 2005.

In addition to this particular gaming district, the bill also permits the creation of other gaming districts. The Department of Revenue must first designate a gaming district under AS 05.15.707(3). The bill prohibits the Department from designating a gaming district in a borough with a population of less than 30,000. Then the gaming district must be approved by a majority of voters of that borough. AS 05.15.701(7).

Under the bill, an "eligible applicant" is someone who owns, holds an option to purchase, or leases for ten years an "acceptable parcel" within a gaming district. AS 05.15.701(6). "Acceptable parcel" is defined to mean at least 10 acres of land. AS 05.15.701(1).

An eligible applicant may apply for a license to conduct VLT Gaming Operations in the gaming district. AS 05.15.703. Following the submission of a complete application, the Department of Revenue is required to issue a license upon a finding that the applicant is eligible and suitable. AS 05.15.703(1); AS 05.15.705 -- .706. The Department is prohibited from issuing more than one license in any one borough. AS 05.15.707(h).

The practical effect of this scheme is that the owner, option-holder or leaseholder of the south Anchorage property identified by the bill will be able to submit an application for a license prior to the Department having the opportunity to designate any other gaming district, and prior to any vote on such additional gaming districts. Assuming that the owner or option holder of this property is qualified to obtain a license under this bill, the Department must issue it to them. Thereafter, the Department is barred from issuing any other license in Anchorage. Therefore, it appears an almost certainty that the owner or option holder of the south Anchorage property will have a

monopoly on video gaming within Anchorage. This appears to be consistent with the sponsors' alleged statements reported by the media:

Ken Jacobus, an Anchorage attorney and a co-sponsor of the initiative, acknowledged there were competitive advantages written into the proposal but said it's fair because the prime sponsor is the one spending the money to get the matter passed. "The person who sponsors this and puts it together would have to recoup their investment," Jacobus said. "The numbers mandate a competitive advantage."

Matt Volz, *Alaska Video Gaming Initiative Returns*, Anch. Daily News, July 19, 2005.<sup>1</sup>

In correspondence with this office regarding this issue, counsel for the initiative committee contends that Anchorage is not a borough and therefore the provision in the bill limiting one license per borough (AS 05.15.707(h)) does not apply to Anchorage. See Letters of Jacobus to Barnhill of 10/16/05 and 10/18/05. Thus, the initiative committee submits that the bill would not confer a video lottery monopoly upon the owner, optionholder or leaseholder of the south Anchorage property.

With all due respect, we disagree. The Alaska Constitution divides the "*entire* State . . . into boroughs, organized and unorganized." art. X, sec. 3, Alaska Constitution (emphasis added). The legislature has implemented this provision in AS 29.03.010: "Areas of the state that are not within the boundaries of an organized borough constitute a single unorganized borough." The implication is clear—all areas of the state are either in the unorganized borough or in an organized borough. While Anchorage has become a unified municipality under AS 29.06.190, et seq., it nevertheless remains within an organized borough.<sup>2</sup> Thus, we are highly reluctant to conclude, as the initiative committee apparently has, that the language of the bill exempts Anchorage from the one license per borough provision of the bill. Moreover, we are even more reluctant to rely upon their correspondence as legislative history of the drafters' intent.

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<sup>1</sup> We place no reliance on these alleged statements, except to say that they appear consistent with our analysis of the bill.

<sup>2</sup> We have previously opined that despite unification, Anchorage appears to be a borough. See 1988 Inf. Op. Att'y Gen. (Dec. 2; 663-89-0240).

As we have explained previously, the framers of the Alaska Constitution intended to “absolutely prohibit use of the initiative to enact local or special legislation . . . .” See 2005 Inf. Op. Att’y Gen. 5 (April 19; 663-05-0177).<sup>3</sup> In order to avoid this constitutional prohibition, there must be a “rational basis for the particular classification” and that classification “must bear a reasonable and proper relationship to the purposes of the act and the problem sought to be remedied.” *Boucher v. Engstrom*, 528 P.2d 456, 463 (Alaska 1974).

As drafted, this bill confers a special benefit on the narrowest class of persons: the owner, option-holder or leaseholder of a single piece of property in South Anchorage. It is precisely the kind of unwarranted special benefit contemplated by the constitutional prohibition on special and local legislation. The fact that the bill makes it theoretically possible for other persons to obtain a video lottery monopoly in Juneau or Fairbanks does not mitigate the problem. The extremely narrow classification bears no relationship to the purposes of the act and the problem sought to be remedied. Therefore we conclude that this bill is without rational basis. We recommend, again, rejection of this bill.

## 2. The form of the application

The form of an initiative application is prescribed in AS 15.45.030, which provides:

The application shall include (1) the proposed bill to be initiated, (2) a statement that the sponsors are qualified voters who signed the application with the proposed bill attached, (3) the designation of an initiative committee of three sponsors who shall represent all sponsors and subscribers in matters relating to the initiative, and (4) the signatures and addresses of not less than 100 qualified voters.

The application meets the first three requirements. With respect to the fourth requirement, the Division of Elections within your office determines whether the application contains the signatures and addresses of not less than 100 qualified voters.

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<sup>3</sup> We incorporate by reference our discussion of this issue from our previous opinions. See 2005 Inf. Op. Att’y Gen. 6 (Aug. 1; 663-05-0239); 2005 Inf. Op. Att’y Gen. 5-10 (April 19; 663-05-0177).

3. Number of qualified sponsors

The Division of Elections within your office will determine whether there are a sufficient number of qualified sponsors, to the extent this is necessary.

**III. CONCLUSION**

For the above reasons, we find that the proposed bill is not in the proper form, and therefore recommend that you do not certify this initiative application.

If you decide to reject the initiative, we suggest that you give notice to all interested persons and groups who may be aggrieved by your decision. AS 15.45.240. This notice will trigger the 30-day appeal period during which these persons must contest your action or be forever barred from doing so. *McAlpine v. University of Alaska*, 762 P.2d 81, 86 (Alaska 1988).

Please contact me if we can be of further assistance to you on this matter.

MAB/ccg

cc: Whitney H. Brewster, Director of the Division of Elections